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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1030

JOSEPH DEL NOBILE,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Petitioner, Joseph Del Nobile, respectfully prays that a Writ of Certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered on July 1, 1970. The Supreme Court of New Jersey denied Petitioner's Petition for Certification by order dated October 7, 1970.

Opinions Below

None of the opinions of the courts below have been reported officially or unofficially.

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division was entered on July 1, 1970 (Appendix, p. 27a).

A Notice of Petition for Certification was filed with the Supreme Court of New Jersey on July 15, 1970. The Petition for Certification was denied by the Supreme Court of New Jersey by order dated October 7, 1970 (Appendix, p. 31a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (c).

Question Presented for Review

1. Whether, in compliance with the Fourth Amendment of the United States Constitution, the application for a search warrant (Appendix, p. 1a), dated January 24, 1968, contained sufficient grounds for a finding of probable cause for the issuance on January 24, 1968 of a search warrant (Appendix, p. 4a), by the Honorable Benjamin P. Galanti, Judge of the Bergen County (New Jersey) Court.

Constitutional Provisions Involved

The Fourth Amendment of the United States Constitution U.S.C. Const. Amend. IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case

Petitioner, Joseph Del Nobile, was indicted by the Bergen County Grand Jury for possession of lottery slips, papers, documents and memoranda in violation of N.J.S.A. 2A:121-3 and for willfully and unlawfully making book upon the running of horses, mares and geldings in violation of N.J.S.A. 2A:112-3.

The indictment arose out of a search conducted on January 24, 1968 at the premises known as 209 Porter Avenue, Bergenfield, New Jersey, pursuant to a Warrant issued by the Honorable Benjamin P. Galanti on the basis of an Affidavit dated January 24, 1968, submitted by Albert Hynes, an investigator in the employ of the Bergen County Prosecutor's Office.

In his affidavit, Investigator Hynes stated that Captain Richard J. Kikkert of the Bergen County Prosecutor's Office received confidential information from a reliable informant, one whose information in the past had resulted in the arrest of two persons for gambling violations, (1) that Joseph Del Nobile of 209 Porter Avenue, Bergenfield, New Jersey, was involved in an illegal gambling operation at his home, (2) that Mr. Del Nobile would appear at the Town Hall Inn on South Washington Avenue in Bergenfield and pick up gambling bets from within the premises, (3) that Mr. Del Nobile appeared there daily during the noon hour, and, after approximately one hour, would return to his home and continue to take bets on the telephone, (4) that during the month of January, 1968, he (Hynes) kept the premises at 209 Porter Avenue, Bergenfield, New Jersey, under observation for five days, (5) that on each of January 11, 15, 16, 17, and 18, 1968, at approximately 11:30 A.M., he (Hynes) observed Mr. Del Nobile leave his home with Vincent J. Fradella (Fradella

had not been mentioned by the informant), in whose automobile they drove to the Town Hall Inn, (6) that at approximately 1:00 P.M. on each of those days, they drove back to Mr. Del Nobile's residence, (7) that on each occasion Mr. Del Nobile entered his home and Mr. Fradella drove off in his vehicle, and (8) that Mr. Fradella was a known gambler and had been arrested in New York City for gambling violations.

The Affidavit set forth a physical description of Joseph A. Del Nobile and described the premises known as 209 Porter Avenue, Bergenfield, New Jersey. It then stated that, as a result of Investigator Hynes' belief that Joseph A. Del Nobile was inv 'ved in an illegal gambling and telephone operation and that gambling paraphernalia would be found on his person and on said premises.

On January 24, 1968, the Honorable Benjamin P. Galanti, Judge of the Bergen County Court, issued a search warrant pursuant to Investigator Hynes' affidavit. On the same day, a search was conducted of the premises at 209 Porter Avenue, Bergenfield, New Jersey, by the Bergen County Prosecutor's Office. The following were seized (Appendix, p. 6a): nine pieces of paper containing some writing, one daily newspaper, one pencil, one pad (blank), and two dollars and sixty-four cents (from the person of Petitioner).

Subsequent to Petitioner's indictment and after he had pleaded not guilty to the indictment, a Notice of Motion was filed on Petitioner's behalf to suppress the evidence seized during the aforementioned search on the grounds that the search warrant was issued without probable cause. After a hearing on the Motion and argument by counsel, the Honorable Arthur J. Simpson, Judge of the Bergen County Court, granted the Motion to Suppress

(Appendix, p. 7a). The Order suppressing evidence was entered on September 9, 1968 (Appendix, p. 23a).

On October 29, 1968, the Superior Court of New Jersey, Appellate Division, granted leave to the State of New Jersey to appeal from the Order suppressing the evidence. After hearing arguments of counsel, the Appellate Division on June 26, 1969 (Appendix, p. 24a), reversed the Order suppressing evidence stating only:

> "We think the search warrant here involved passed muster even as against the strictures laid down in *Spinelli* v. *United States*, 21 L. Ed. 2d 637, 643-4 (1969). And see *State* v. *Kasabucki*, 52 N. J. 110 (1968)."

Petitioner filed a Petition for Certification with the Supreme Court of New Jersey again raising the federal question. On September 15, 1969, the Supreme Court of New Jersey denied Petitioner's Petition for Certification (Appendix, p. 26a).

On October 20, 1969, a jury trial was held in the Bergen County Court, Law Division, before the Honorable Benjamin P. Galanti. At the trial, Petitioner's counsel registered a standing objection to the fruits of the search in question. On October 31, 1969, the jury returned a verdict of guilty on both indictments.

On December 11, 1969, Petitioner was sentenced by Judge Martin J. Kole to fifteen months to two years to be served concurrently on each of the indictments to the New Jersey State Prison.

A Notice of Appeal was filed with the Superior Court of New Jersey, Appellate Division, on December 15, 1969. The Appeal was argued on June 22, 1970 and, on July 1, 1970, the Appellate Division affirmed the conviction of

the Petitioner (Appendix, p. 27a). The question of the legality of the search in question, having again been raised by the Petitioner, the Appellate Division stated in its unreported opinion:

> ". . . Under the legal concept known as 'The Law of the Case,' our prior determination that probable cause existed for the issuance of the search warrant is binding upon all parties in the case, *Ehnes* v. *King,* 50 N. J. Super. 109, 113 (App. Div. 1958), and upon us on the appeal. *New Amsterdam Casuality Co.* v. *Popovich,* 18 N. J. 218, 224 (1955). We note, however, that it may not be binding on the Supreme Court. Id. at 224."

Petitioner again petitioned the New Jersey Supreme Court, again raising the Fourth Amendment question. By Order dated October 7, 1970, the Supreme Court of New Jersey denied Joseph Del Nobile's Petition for Certification (Appendix, p. 31a).

Reasons for the Allowance of the Writ

The decision of the Superior Court of New Jersey, Appellate Division, has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

Petitioner contends that the warrant in this case was issued without a showing of probable cause. There is a striking similarity between the facts in the instant case and the facts in *Spinelli* v. *United States,* 393 U. S. 410, 21 L. Ed. 637, 89 S. Ct. 584 (1969). In both cases, the affidavit in support of the warrant was based on information obtained from an informant and on observation by a law enforcement officer.

As required by *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) and *Spinelli* v. *United States, supra,* an application for a search warrant must meet a two-pronged test. First, the application must "set forth . . . the underlying circumstances necessary to enable the magistrate independently to judge of the validity of the informant's conclusion" that an individual was engaging in gambling activity. Second, affiant-officers must "support their claim that their informant was 'credible' or his information 'reliable'." *Spinelli* v. *United States,* 393 U. S. at 413. It is respectfully submitted that, very clearly, neither of the above tests have been met in the instant case.

Petitioner recognizes that a showing of probable cause may be founded on hearsay. However, in the instant case, the affidavit nowhere indicates that the affiant ever had any dealings with the informant. Rather, the affiant (Investigator Hynes) stated that another officer, Captain Kikkert, received the confidential information. Therefore, the confidential information was the product of at least double hearsay. Further, there is no indication of how the informant obtained his information. It could very well have been by further hearsay. As was stated in *Spinelli, supra* at 416:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

In the instant case, all the informer said was that there was a gambling operation in which Petitioner was involved

and that Petitioner went to the Town Hall Inn daily. It is submitted that this is not enough to show underlying circumstances to support probable cause.

As to the informant's reliability, the only indication thereof in the affidavit was that "Captain Kikkert's informant"—*not* the affiant's—had supplied information in the past which had resulted in two gambling arrests—*not* convictions.

The independent investigation by Investigator Hynes revealed only that Joseph Del Nobile, on five occasions, went to the Town Hall Inn at approximately the noon hour with one Vincent Fradella. Fradella was described in the affidavit as a "known gambler" who had been arrested—*not* convicted—for gambling activities in New York. This might well be said to be, in the words of *Spinelli,* a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." 393 U. S. at 414.

It is, therefore, respectfully submitted that the application in the instant case did not meet the standards set by this Court in the *Aguilar* and *Spinelli* decisions. First, "the application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that" Petitioner was engaged in gambling activity. Second, the affiant (Investigator Hynes) "did not attempt to support [his] claim that [Captain Kikkert's] informant was 'credible' or his information 'reliable'."

As in *Spinelli,* the surveillance and investigation conducted by Investigator Hynes "contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip."

CONCLUSION

Since the courts of the State of New Jersey have decided the Fourth Amendment question in the instant case in a way not in accord with the *Aguilar* and *Spinelli* decisions of this Court, Petitioner respectfully prays for a Writ of Certiorari.

Respectfully submitted,

WINNE & BANTA,
JOSEPH A. RIZZI,
Counsel for Petitioner, Joseph A. Del Nobile,
25 East Salem Street,
Hackensack, New Jersey, 07602.

November 20, 1970.

[APPENDIX FOLLOWS]

APPENDIX

Application for Search Warrant

STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

On this 24th day of January, 1968 before me, the undersigned Judge of the County Court of Bergen County, personally appeared Inv. Albert Hynes, who being duly sworn upon his oath according to law deposes and says:

1. I am a law enforcement officer associated with the Bergen County Prosecutor's Office of the County of Bergen, in the capacity of Investigator.

2. I have good reason to believe and do believe that in and upon certain premises within the Borough of Bergenfield in this County and State, to wit: Premises known as 209 Porter Ave., Bergenfield, New Jersey, and the person of Joseph A. Del Nobile, and more particularly described as follows: A two-story, one-family dwelling, brown shingles and red brick front located at 209 Porter Ave., Bergenfield, N. J.

Joseph A. Del Nobile is described as a white male, age 35, 5 ft. 10 in. tall, medium build, brown hair, blue eyes, who resides at the above address.

There has been and now is located certain property to wit: Pads, pencils, run-down sheets, scratch sheet, bet slips, money, lottery paraphernalia, and any other gambling paraphernalia in violation of the following statutes used in connection with or in furtherance of the commission of a crime in violation of the Laws of the State of

Application for Search Warrant

New Jersey, to wit: Bookmaking 2A:112-3 and/or Lottery 2A:121-3.

3. That the facts which establish the grounds for this application and the probable cause of my belief that such grounds exist are as follows:

I, Albert Hynes, am an Investigator, attached to the Bergen County Prosecutor's Office Gambling Squad. I have been a law enforcement officer for three (3) years and am familiar with gambling investigations as I have conducted more than 100 in the past.

Captain Richard J. Kikkert of the Bergen County Prosecutor's Office, received confidential information from a reliable informant that one Joseph A. Del Nobile of 209 Porter Ave., Bergenfield, New Jersey, was involved in an illegal gambling operation at his home. Capt. Kikkert's informant stated that Joseph A. Del Nobile did appear at the Town Hall Inn on South Washington Avenue in Bergenfield daily and pick up gambling bets from within the premises. He would appear there daily during the noon hour. He would leave said premises after staying for approximately one (1) hour and return to his home where he would continue to take bets over his telephone.

On January 11, 15, 16, 17, and 18, 1968, I observed Joseph A. Del Nobile leave his home at approximately 11:30 A.M. He left in the company of one Vincent J. Fradella in Fradella's vehicle, a 1964 Chevrolet blue sedan, N. J. Registration JHI 582, drive to the Town Hall Inn, 52 South Washington Ave., Bergenfield, New Jersey. Both persons left the vehicle and entered the Town Hall Inn at about 1:00 p.m., both persons alighted from the premises and drove back to Del Nobile's residence, where Del Nobile entered same and Fradella drove off in his vehicle.

Application for Search Warrant

Vincent Fradella is a known gambler and has been arrested by the New York City Police Department for gambling violations. Also on the above-mentioned date, Del Nobile did not leave his residence before 3:00 p.m. the hour which I concluded my surveillance.

I made a visual observation of the premises, located at 209 Porter Ave., Bergenfield, New Jersey, and it is described as a two-story, one-family dwelling, brown shingles, and a red brick front.

Joseph A. Del Nobile is described as a white male, age 35, 5 ft. 10 in. tall, medium build, brown hair, blue eyes, who resides at the above address.

Capt. Kikkert's informant has been reliable as he has supplied information in the past which resulted in the arrest of Felix Solomon and Frances Bennett for gambling violation .

As a result of the information received and the investigation conducted, I have reason to believe and do believe that one Joseph A. Del Nobile is involved in an illegal gambling and telephone operation and that gambling paraphernalia will be found on his person and the premises hereinabove described.

Wherefore I respectfully move that a search warrant may issue authorizing a search of the aforesaid premises and the seizure of said property if found in the manner provided by law.

ALBERT G. HYNES

(Sworn to January 24, 1968 before the Hon. Benjamin P. Galanti, J. C. C.)

Search Warrant

COUNTY COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } SS.:

To: Inv. Albert Hynes or any police officer of an authorized police agency of the State of New Jersey.

Complaint on oath and in writing having been made before me, one of the Judges of the County Court of Bergen County on this day by investigator Albert Hynes alleging that he has good reason to believe and does believe that in and upon certain premises and/or appurtenant structures located thereon within the Borough of Bergenfield, in this County and State, to wit: Premises known as 209 Porter Ave., Bergenfield, New Jersey, and the person of Joseph A. Del Nobile, and more particularly described as follows: A two-story, one-family dwelling, brown shingles, and red brick front located at 209 Porter Avenue, Bergenfield, New Jersey.

Joseph A. Del Nobile, is described as a white male, age 35, 5 ft. 10 in. tall, medium build, brown hair, blue eyes, who resides at the above address, there has been and now is located certain property to wit: Pads, pencils, run-down sheets, scratch sheets, bet slips, money, lottery paraphernalia, and any other gambling paraphernalia in violation of the following statutes used in connection with or in furtherance of the commission of a crime in violation of the Laws of the State of New Jersey, to wit:

Bookmaking 2A:112-3 and/or Lottery 2A:121-3.

And the undersigned having examined and considered the application for this search warrant does find that

probable cause exists for the issuance of a search warrant;

Therefore, you are hereby commanded to enter by breaking, if necessary, in the day or night time and search with the necessary and proper assistance the place hereinabove named for the property specified, making known to the person or persons in control thereof, if any, your authority for so doing and to seize and take into your possession all such specified property which may be found on the said premises to the end that the same may be dealt with according to law.

You are further commanded to give a copy of this warrant to the person in control thereof, if any, or in the absence of such person to leave a copy of this warrant in the place hereinabove named. In the event you seize any of the above described articles you shall give a receipt for the property so seized to the person present, if any, or in the absence of such person leave such receipt in the place where said property is found.

You are further commanded to execute this warrant within ten days from the issuance hereof and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand at o'clock M., this 24th day of January, 1968.

BENJAMIN P. GALANTI,
J.C.C.

A. HYNES

Return of Search Warrant

Returned this 24th day of January, 1968.

Warrant served January 24, 1968 at 1:35 p.m. by making a search as directed by the attached with the assistance of the following persons: Detective Dominick Mancini; Inv. Ralph Cenicola; Capt. John Ives, Bergenfield Police Dept.; Det. Lawrence Dorsey, Bergenfield Police Dept.; Det. Donald Stumpf.

Upon said search I found and seized and duly inventoried the following property in the presence of Inv. Ralph Cenicola, a credible person.

INVENTORY

Nine (9) Pieces of Paper with Writings Thereon

One (1) Daily News Newspaper, dated January 24, 1968

One (1) Pencil

One (1) White Pad

U. S. Currency in the amount of $2.64

I, Inv. Albert Hynes, the officer by whom this search warrant was executed, do swear that the above inventory contains a true and itemized account of the property taken by me on the warrant.

I further certify and swear that a copy of this warrant, together with an itemized receipt for the said property was given to Joseph A. Del Nobile the person from whom it was taken.

ALBERT HYNES

(Sworn to January 24, 1968.)

Argument on Motion to Suppress

August 23, 1968

Bergen County Courthouse
Hackensack, New Jersey

Before:

HONORABLE ARTHUR J. SIMPSON, JR.,
J.C.C.

Appearances:

HON. GUY W. CALISSI, Prosecutor of the Pleas.
By: PETER F. BOGGIA, Assistant Prosecutor.
For the State of New Jersey.

WINNE & BANTA, ESQS.
By: JOHN DOLAN HARRINGTON, ESQ.
For the Defendant.

(2)* The Court: This is a Motion to Suppress, *State* versus *Joseph Del Nobile,* on Indictment No. S-142-68, where the defendant is the moving perty, John Dolan Harrington, of Winnie and Banta. I have your brief, Mr. Harrington. Do you want to proceed with your argument?

Mr. Harrington: Yes, sir.

The Court: I have also read the *Kasabucki* case.

Mr. Harrington: As your Honor mentioned, this is a motion to suppress evidence taken from the home of Joseph Del Nobile as a result of a search warrant that was issued by Judge Galanti here in Bergen County. At this time I would like the Court to consider what I have to say in order that an order to suppress this evidence be granted.

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Argument on Motion to Suppress

The brief that I filed indicates two points and I will try to stick with those two points in order to conserve the time, because I feel the issue of probable cause is of great importance in the case.

The cases that I have read and the cases which I believe set out what the Court must consider before a warrant is issued, I have cited (3) in my brief and I also rely on this recent case of the *State* v. *Kasabucki*.

If your Honor will recall, this warrant was issued as a result of Officer Hines, who testified before Judge Galanti at the time the warrant was issued that he had the home of Joseph Del Nobile under surveillance for, I believe, five days, beginning January the 11th, which was a Thursday from approximately 11:30 to 3 o'clock in the afternoon, and he came back Monday, Tuesday, and Wednesday. On each of these days he testified that he observed the defendant, Joseph Del Nobile, leave his home at approximately 11:30 and go with a person by the name of Mr. Fredella to the Town House-Inn in Bergenfield, and then he waited and, apparently, they left there approximately one o'clock and came back to the defendant's home. He saw this on five occasions.

He also in his affidavit told Judge Galanti that Captain Kikkert, of the Bergen County Police Department, received information from a confidential informant saying that Joseph Del Nobile was taking bets at the Town House-Inn and that he was placing bets on his phone at his home at 209 (4) Cortel Avenue, Bergenfield. That is what I have interpreted from the affidavit and I think, the question is, your Honor, this point that if you were the issuing magistrate, the issuing judge for this warrant, what would you consider to be sufficient evidence

to show probable cause that a crime was committed and that this person who a warrant is sought to be applicable, was the person who committed a crime. And, of course, my argument is that there isn't sufficient evidence. First of all, the affidavit only sets forth what Detective Hines observed as the form of watching two people leave the defendant's home and go to a restaurant the same as if I left my home at 11:30 and went with someone by the name of Mr. Fredella. The affidavit says Mr. Fredella was a known gambler. It doesn't say anything about his being convicted of the crime of gambling. The affidavit says that the confidential informant gave information that led to the arrest of two people. One of these persons is named Felix Solomon and I know for a fact that Mr. Solomon has not been convicted of a—well, I can't say that—I know for a fact that Mr. Solomon has been indicted, but he has not (5) been convicted of a gambling charge. I can't even say that as to the past. There is an indictment pending against Mr. Solomon at the present time and I think he is going to be tried soon, but at the time of this affidavit it doesn't say that Mr. Solomon was convicted of gambling. It just says he was arrested as a result of this informant's information.

The second argument, your Honor, is that Captain Kikkert, who received the confidential information, did not appear before Judge Galanti. That Detective Hines appeared and told Judge Galanti what he was told by Captain Kikkert.

In this recent case, and I think your Honor recalls, in the *Kasabucki* case where the letter came from the Chief of Police in New York City somewhere to the Prosecutor's Office in Union County and the court upheld and

said that was sufficient credible information for the police to present to the judge and the judge to consider this affidavit in the form of hearsay testimony from New York, an informant from New York, who says to the police in New York who sent a letter over, and, of course, the Police Chief in New York didn't appear before the judge who issued that warrant. But this case (6) is also coupled with a telephone conversation that one of the detectives had with a voice that was on the other end of the phone, where the police had checked out the phone to see whose name it was in. And on that conversation, they found that that was sufficient probable cause to issue the warrant. Here, there was no conversation, no one ever called the defendant's home. The detective here said he went into the Town House. The detective doesn't say that Joseph Del Nobile has a record. He doesn't say anything about the defendant except that he himself believes probable cause existed based on his three years experience as a detective with the Bergen County Police.

I think the *Kasabucki* case does not overrule what the Court said in *State* v. *McCrae*. I think it substantiates that point that the judge, the issuing magistrate, must find probable cause from the evidence presented to him at the time the warrant is issued and if the prosecutor were here today and said, "Your Honor, these are the facts from the information that I have; I have watched this house, I have seen two men at 11:30 go to a tavern and come back at one." No other information, and he was in the house only (7) four consecutive days and one disconnected day with the prior week and I have reliable information which was told to me by somebody who isn't in this room, who received the information from someone who isn't in this room, and I think it is easy

to infer if the warrant was issued by Judge Galanti, Captain Kikkert's office is on the second floor of this building, and Judge Galanti, I believe, was on the third floor at the time, and certainly accessible to be asked.

That is basically my argument, your Honor, plus I want to corroborate my brief.

The Court: Yes, it is, of course, a very fine brief.

Mr. Harrington: That, I have not mentioned at this time.

The Court: All right. Thank you. Mr. Boggia, do you have the affidavit that Judge Galanti had?

Mr. Boggia: Yes, your Honor. If your Honor please, the State in this motion to suppress, will rely primarily on the *Kasabucki* case and I submit that the facts in that case generate a far lower degree of probable cause, if you can characterize that as such, than the (8) facts in our case. Now, what were the facts in the *Kasabucki* case? We have in the case, which was a bookmaking case and which was a review of the motion to suppress and in that case the Supreme Court of New Jersey through Justice Francis laid down the guidelines by which a reviewing court will judge a particular affidavit. In that case, which is reported in 52 N. J. at page 110, the Supreme Court stated that, "The facts asserted in affidavit in support of a search warrant must be tested by the practical considerations of everyday life on which reasonably prudent and experienced police officers act." That the "judge of equal jurisdiction" which we have in this situation, "should regard as binding the decision of his brother judge that probable cause had been sufficiently shown to support the warrant, unless there was clearly no justification to support that conclusion."

Now, what do we have in this situation? We have, if your Honor please, a situation of an experienced investigator, who is assigned to the Prosecutor's office, and he states that he received confidential information from a reliable informer who has been reliable in the past and his information (9) has resulted in the arrest of gambling individuals who have conducted gambling operations. And he testifies that he received this information from an individual who would appear at a town house, a town hall, with a known gambler, at a particular hour and would remain there for a specific period of time and then would leave this particular town house. So what did he do in this situation? He conducted a surveillance and this information was specifically corroborated by his own observations. Now what do we have in the *Kasabucki* case? I submit, if your Honor please, what we have in the *Kasabucki* case is a situation at best that would be hearsay. We have a letter received from the New York Police Department, which was addressed to the Police Chief of Elizabeth, New Jersey, and this letter was received by the Prosecutor, who in turn transmitted the information to a Detective Ward. And what did this particular letter state? It said, "We have confidential information." No mention of a reliable informer, but, "We have confidential information that bookmaking activity is being conducted" and that is all we have. And what does the Supreme Court state? The Supreme Court states that (10) "This letter had a ring of authenticity to it and that the 'confidential information' about the bookmaking operation was substantial and reliable," and the Court may infer that it is reliable.

We don't have to draw any inferences in this situation, if your Honor please, because the affidavit on its

face states that it was reliable and it did result in arrest of known bookmakers.

The Court: It plus the telephone call.

Mr. Boggia: It plus the telephone call.

And if your Honor please, we have a situation with the telephone call. No surveillance was taken in the *Kasabucki* case. We have a telephone call where no bets were taken over the telephone. However, if your Honor please, I believe the *Kasabucki* case is keynoted by two factors which you, as a reviewing Judge, must take into consideration to determine whether there is no basis at all to sustain the warrant, and that is, if your Honor please, the experience and expertise of a member of an investigating gambling force. And in the *Kasabucki* case, the Supreme Court stated that specifically moreover that the attitude would probably result in failure to take into account a significant fact— (11) the officer's experience with bookmaking activities and the factual indications of that. And likewise, the *Kasabucki* case stands also for the fact that the "confidential information" received by a law enforcement agency is a significant factor in determining probable cause.

As in the *Kasabucki* case, the court stated that each fact does not have to have a character of probable cause, that it is the totality of the circumstances that an individual must determine whether there is probable cause. And the court stated that "Realistically, the warrant-support search ought to be regarded as cloaked with an aura of prima facie legality," and "A reviewing court should not apply a proof-of-guilt test to affidavits or testimony designed only to reveal probable cause." And that it is "Only by utilizing this approach can a reviewing court

give fair leeway to police officers' honest efforts to administer the criminal law."

I submit, if your Honor please, in this case, considering the facts in their totality, there can be no doubt that there was an absence of any rational basis to find that there was probable cause and I think that is what this Court (12) has to find in this situation.

The Court: Can I see the affidavit on which the search warrant was issued?

Is there anything else you want to say, Mr. Boggia?

Mr. Boggia: I believe that is it, your Honor.

The Court: Now, Mr. Boggia, I have read over the *Kasabucki* case carefully, as both of you attorneys obviously have, also. There is no question that the *Kasabucki* case is a much stronger case than this one. A telephone conversation makes it materially different. There is no doubt about that in my mind. The question I have for you is this: Is the basis of this search warrant the fact that Fradella is a known gambler, is that it? I mean, you can't seriously contend that the prediction by an informer, confidential informer, that two people would leave one man's house and go to a restaurant and stay there an hour and leave the restaurant, that this would constitute a sufficient basis to search their house. I can't conceive you are contending that. I assume you are not contending that.

Mr. Boggia: If your Honor please—

(13) The Court: On the same basis, you can contend that Judge Malech and I have lunch every day at the Famous Restaurant because a known informer told you that we were having lunch there at one and we would

be back at two, therefore, you could search my chambers, because a gambling operation was going on.

Mr. Boggia: As I say, if your Honor please, one of the significant factors is that he was cavorting with a known gambler.

The Court: That is what I am asking. That the basis—is there any authority for a search warrant to issue on the basis of a person being in the company of a known gambler at a particular time and place?

Mr. Boggia: It is a circumstance, your Honor, which, as the court in the *Kasabucki* case and *State* v. *Tanzola,* stated that in dealing with a bookmaking operation, one of the most significant and probably the most significant factor in this case, is the experience of the police officers.

The Court: What has experience got to do with this at all? I don't see anything in this affidavit of it. Is there any other information (14) besides this, which was in front of Judge Galanti, when he issued the search warrant? Now, there was testimony in the *Kasabucki* case as to all testimony taken before the Judge, and so forth. Is there anything except this affidavit of Hines that was before Judge Galanti when he issued a search warrant?

Mr. Boggia: I believe that is all that was in front of the Judge.

The Court: All right. Then that is what I assume was the case and apparently both attorneys assume, that the only thing before Judge Galanti was Albert Hines and this affidavit.

Mr. Harrington: Your Honor, if I may, excuse me, for saying it, I did check the minutes at the building and that is all there is. Nothing on the record.

The Court: Nothing else?

Mr. Harrington: No other testimony other than what is in the affidavit.

The Court: Is there any authority, Mr. Boggia, for a search warrant to be issued on an affidavit such as this? In other words, an affidavit that a reliable informer told the police officer. I am paying no attention to the (15) fact that it's hearsay between Kikkert and Hines. This makes no difference in my opinion. But what the informer did was to say and the police would be entitled to rely upon it, no question about that either, but what he said was that Del Nobile and a known gambler—

Mr. Boggia: Your Honor, I think one of the most significant things in that affidavit is that the information given by this reliable informer was corroborated through the letter of what he actually said.

The Court: It wasn't corroborated. That is why I am asking. Was it corroborated? The only thing corroborated that I can see so far that appears to me at the moment, is that the informer was right, in that a known gambler would meet Del Nobile and they would go to this restaurant.

Mr. Boggia: At a particular hour.

The Court: At a particular hour at the noon hour. But the informer says they would pick up gambling bets from those premises. Now, there was no observation by Hines that Del Nobile did any such thing. The informer also said that he would go back to Del Nobile's house and take bets (16) over the telephone. No proof or observation of that. There was proof only that the two men went from Del Nobile's house to the restaurant at lunch hour

and then went back home to Del Nobile's house. Now, that in and of itself wouldn't be sufficient to issue a search warrant to search the house, would it? The fact that two men went out and had lunched at a restaurant, even though the informer could predict it, because he happened to know where they were going to have lunch that day or every day for that matter? Would that be a sufficient basis to search one of their houses or both of their houses? No. So the informer tells them they are going to pick up bets at the Town Hall Restaurant, then they are going to go back to the apartment and take bets over the telephone, none of which Hines or anybody else observed, that I can see. They didn't tap the telephone. The question of whether they can or can't I am aware of. That they didn't observe anything unusual going on in the restaurant, and it happens to be lunch hour from twelve to one in generally accepted parlance. The additional fact is that Fredella is a known gambler, that I would concur with you and that is why I ask you if there is any (17) authority for predicted activity, which otherwise would be insufficient to issue a search warrant, that is to say, really going to lunch and coming back at a predicted hour, which, in and of itself, I would think would be clearly insufficient for a search warrant. But coupled with the prediction of a known gambler being in the company of Del Nobile and the fact that the evidence presented to Judge Galanti was that the known gambler was a certain person, Vincent Fredella, and he certainly was a known gambler, is there any authority that that would be sufficient, just being in the company of a known gambler, would that be sufficient authority to issue a search warrant?

Argument on Motion to Suppress

Mr. Boggia: Your Honor, I think *Kasabucki* stands for the proposition that a police officer in his experience dealing with a situation like gambling, which is a very furtive activity, which is done in a manner to avoid any form of detection, and that to a trained police officer this activity would generate in his mind that there were certain operations going on.

The Court: Right.

Mr. Boggia: But all of this would not take (18) on the appearance to a reviewing judge. I think that is a very significant factor that must be taken into account by the Court, although the Court in examining an affidavit on its face would state that it has the appearance of normal lawful conduct, but to a police officer who deals in these operations every day and who made a surveillance and who knows this individual is a gambler, those cumulative factors generate in his mind that there were gambling operations and that this is a most significant factor, which the Supreme Court stated and that a reviewing judge cannot listen to and that the only way to throw the search warrant out is to find no rational basis at all, and I submit, your Honor, in this case we have a sufficient basis. The record is not barren with any fact that the Court—

The Court: It is barren of any consequential fact except the fact that Fredella was a known gambler. That is why I asked you a couple of times if there is any authority on it. I can't conceive of a fact that a confidential informer tells the police that a suspect is going to have lunch with somebody else and go to a certain place at a certain time and that it happens to be a (19)

restaurant, lunch time, and pick up bets, and there is no information or observation at all to indicate that and there isn't in this affidavit, there is nothing to indicate here that anything improper or illegal was going on in the Town Hall Inn or in the apartment except two things. There are only two factors, one of which was his association with a known gambler, and the other one that they happened to go to the same restaurant each one of these days, and you can't seriously contend that the fact that an informer predicted where they would go at lunch time would be sufficient to search the man's apartment. I doubt if it would be even sufficient to search the restaurant, certainly wouldn't be, unless the mere fact that he was going regularly with a known gambler to a certain place of day would be sufficient. That seems to me to be the crux of the problem. He made his inspection of the premises. What did he observe? Nothing. Visual observation of the premises, described a house, a visual observation of the Town Hall Inn, no description of it at all of anything going on unusual there. The informant said he would pick up gambling bets. No surreptitious activities were observed of unusual (20) or suspicious actions in the Town Hall Inn, nothing in the apartment house in or out, telephone wise or otherwise. Nothing at all except going to a predicted place, which by itself would certainly be innocuous, a restaurant at lunch time, between twelve and one, and being in the presence of a known gambler.

Now, the *Kasabucki* case is true refers to the constitutional protection as being against unreasonable searches and seizures, but not all searches and seizures, probable cause being required.

It says that wherever there is a doubt, it should be resolved by sustaining the search after there has been a

judicial inquiry. It also says, as you have both indicated, that "A trial judge of equal jurisdiction should regard as binding decision of his brother judge that probable cause had been sufficiently shown to support a warrant, unless there was clearly no justification for that conclusion." That is the question here.

Now, another way of saying the same thing in the case, "We have already indicated that in reviewing the legal propriety of a search warrant, substantial deference should be paid to the (21) court issuing findings of probable cause." And "It must be understood that bookmaking is carried on cautiously, furtively, and deceptively, but that still doesn't eliminate the constitutional protection against unreasonable searches and seizures." It just requires surveillance, "Realistically, then, the warrant-supported search ought to be regarded as cloaked with an aura of prima facie legality," which it has prima facie legality, but it is entitled to be tested in light of constitutional provisions against unreasonable searches and seizures, and I am aware of no authority to the effect that being in the company of a known gambler is a sufficient basis for a warrant to search a man's home. Are you aware of any such authority, Mr. Boggia?

Mr. Boggia: I am not aware of any authority, your Honor.

The Court: The *Kasabucki* case is similar, until you get to the telephone conversation. That is the differentiating factor, completely different. Here you have a telephone call where a Ward in bookmaking language says he wants to place a bet and the inference that is to be drawn from the entire conversation is that the voice (22) from the premises to be searched understands what he was talking

about and continued the conversation, ultimately breaking it off because Ward couldn't convince him that he knew that in between and wouldn't permit him to place the bet. There the issuing judge and reviewing judge, differently interpreted the telephone call and most of the opinion refers to deference to the issuing judge in connection with that original determination as to what the telephone call meant.

Based on this information before Judge Galanti, it is my opinion that this officer should have had some information tending to indicate gambling bets were being picked up at the Town Hall Inn or some information tending to indiciate that bets were being made over the telephone at the apartment. He had absolutely no information as to either one except a statement from an informant that this was in fact occurring. In fact, the informant, according to the affidavit, didn't even predict the meeting between the known gambler and DelNobile at the restaurant. All the affidavit indicates was that the informant stated that DelNobile would, in fact, go to the Town Hall Inn and pick up gambling bets and he (23) had been there during the noon hour, then subsequently on the five days that the observation was made, he did go to that very place. But this is a public restaurant and he was there at lunch hour. The State has indicated no cases to support any proposition that merely being in the presence of a known gambler would be sufficient to permit the issuance of a search warrant. I know of no such authority and with all due deference to Judge Galanti and his many years of experience, it is my opinion that there was clearly no justification for the conclusion that the search warrant should be issued as the basis of this affidavit of Albert S. Hines, and the motion to suppress is granted.

Argument on Motion to Suppress

Mr. Boggia: Thank you, Judge.

(Whereupon the motion to suppress is ended).

* * *

I certify the foregoing to be a true and accurate transcript of the testimony and proceedings in the above entitled cause.

LEONARD T. TAMOWSKI,
C.S.R.

Dated: October 20, 1968

Order Suppressing Evidence

(Filed—September 9, 1968.)

BERGEN COUNTY COURT
LAW DIVISION—CRIMINAL

INDICTMENT: S-142-68

STATE OF NEW JERSEY,

Plaintiff,

vs.

JOSEPH DEL NOBILE,

Defendant.

This matter having been brought before this Court on a motion to suppress evidence obtained by reason of a search warrant and John Dolan Harrington, Esq. of the firm of Winne & Banta, appearing for the defendant Josept Del Nobile, and Peter Boggia, Assistant Prosecutor, appearing for Guy W. Calissi, Prosecutor of Bergen County, and the Court having examined the application for a search warrant and attached affidavit and having heard the argument of counsel and having concluded that the search warrant was issued wtihout proper cause;

IT IS on this 7 day of Sept., 1968,

ORDERED that the evidence obtained by reason of said search warrant is hereby suppressed.

ARTHUR J. SIMPSON, JR.
J.C.C.

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division (June 26, 1969)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-794-68

STATE OF NEW JERSEY

Plaintiff-Appellant,

vs.

JOSEPH DEL NOBILE,

Defendant-Respondent.

Argued May 19, 1969—Decided June 26, 1969.

Before Judges CONFORD, KILKENNY AND LEONARD.

On appeal from Bergen County Court, Law Division.

Mr. Harold N. Springstead, Assistant Prosecutor, argued the cause for appellant (*Mr. Guy W. Calissi,* Bergen County Prosecutor, attorney).

Mr. John Dolan Harrington argued the cause for respondent (*Messrs. Winne & Banta,* attorneys; *Mr. Joseph A. Rizzi,* on the brief).

PER CURIAM

We think the search warrant here involved passed muster even as against the strictures laid down in *Spinelli* v. *United States,* 21 L. Ed. 2d 637, 643-4 (1969). And see *State* v. *Kasabucki,* 52 N. J. 110 (1968).

Reversed.

Judgment and Mandate on Reversal

(Filed—June 26, 1969)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

APPEAL DOCKET NO. A-794-68

CRIMINAL ACTION
ON APPEAL

STATE OF NEW JERSEY,

Plaintiff-Appellant,

vs.

JOSEPH DEL NOBILE,

Defendant-Respondent.

It is hereupon ordered and adjudged that the Order of August 28, 1968 of the said Bergen County Court—Law Division is reversed with costs of the appellant to abide the event and that the record be remitted to the Bergen County Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.

Judgment Entered: June 26, 1969

Mandate Issued: September 25, 1969

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

Order Denying Petition for Certification

(Filed—September 15, 1969)

SUPREME COURT OF NEW JERSEY

C-41 SEPTEMBER TERM 1969

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH DEL NOBILE,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 15th day of September, 1969.

A TRUE COPY

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court

FILED
Sep. 15, 1969

JOHN H. GILDEA
Clerk

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division (July 1, 1970)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-604-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH A. DEL NOBILE,

Defendant-Appellant.

Argued June 22, 1970—Decided Jul 1, '70.

Before Judges Kilkenny, Labrecque and Leonard.

On appeal from Bergen County Court, Law Division.

Mr. John Dolan Harrington argued the cause for appellant (Messrs. Winne and Banta, attorneys).

Mr. Rollin S. Neal, Assistant Prosecutor, argued the cause for respondent (Mr. Robert Dilts, Bergen County Prosecutor, attorney).

PER CURIAM

Defendant appeals from a judgment of conviction for possession of lottery slips (N.J.S.A. 2A:121-3) and for making book (N.J.S.A. 2A:112-3).

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division

Defendant's home was searched pursuant to a regularly issued search warrant and nine pieces of paper, containing writings thereon, and an Armstrong newspaper were seized. At the trial, the State's gambling expert identified part of these papers as horse bet slips and part as number slips. All were received in evidence over defendant's objection.

Subsequent to indictment and before trial defendant moved to suppress the above-noted evidence on the ground that the affidavit upon which the search warrant was issued did not establish probable cause. Following argument of this motion, the trial court entered an order suppressing the evidence. Pursuant to leave first granted, the State appealed from that order and we reversed, holding that the warrant was issued upon probable cause. Certification was denied by the Supreme Court on September 15, 1969.

Now defendant asserts that since the seized evidence was introduced into evidence at the trial, over his objection, he has the right to reargue the issue of lack of probable cause. He concedes that his present factual and legal position is exactly the same as he presented on the last appeal, when we reversed the original order of suppression. Defendant's contention is not sound. Under the legal concept known as "The Law of the Case," our prior determination that probable cause existed for the issuance of the search warrant is binding upon all parties in the case, *Ehnes* v. *King,* 50 N. J. Super. 109, 113 (App. Div. 1958), and upon us on this appeal. *New Amsterdam Casualty Co.* v. *Popovich,* 18 N. J. 218, 224 (1955). We note, however, that it may not be binding on the Supreme Court. *Id.* at 224.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

Defendant next contends that the prosecutor's improper remarks on redirect examination of the State's witness, Hynes, compelled defendant to take the stand in violation of his constitutional rights under the Fifth Amendment against self-incrimination. The remark was made while the prosecutor was re-examining Hynes, an investigator in the prosecutor's office. The witness previously had testified that for a period of five days before his arrest defendant had been picked up by one Fradella and taken to the Town Hall Inn. The witness was then asked if he knew whether Fradella "had gainful employment, any employment?" Defendant objected and it was during the colloquy between court and counsel that the prosecutor stated:

> Judge, the State bears the burden of proving the elements of the indictment that the defendant knowingly and intentionally possessed certain documents.
>
> If Mr. Fradella was a member of the College of Cardinals, wouldn't that have some effect on the jury's ability to decide what it was that was on Mr. Del Nobile's [defendant's] mind when he consulted with Mr. Fradella so if Mr. Fradella was engaged in some other occupation that the witness apparently learned after he met Fradella but prior to the time the warrant was issued, if it is irrelevant, then if the answer is irrelevant, if he says he was an electronics engineer or whatever, then I have no objection to it being stricken.

The court sustained defendant's objection. However, defense counsel did not specifically object to the above state-

ment, nor did he request a mistrial. We do not consider this point to be plain error.

While we do not approve of the statement, we conclude that under the totality of circumstances defendant was not prejudiced thereby. The evidence against him was overwhelming. He took the stand to explain the betting sheets and slips found, as bets he placed for himself rather than for others. He explained that he was putting them into the toilet when the investigator entered in order to keep his wife from finding them. However, he admitted that he knew when the door opened that it was not his wife who was entering. At no time on direct examination did defendant explain his relationship to Fradella. Therefore, it cannot be said that it was the prosecutorss reference to this man which compelled defendant to testify.

Judgment affirmed.

Order Denying Petition for Certification (October 7, 1970)

(Filed—October 7, 1970)

SUPREME COURT OF NEW JERSEY

C-78 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH DELNOBILE,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with cost.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of October, 1970.

JOHN H. GILDEA
Clerk of the Supreme Court

Order Continuing Bail

(Filed—October 15, 1970.)

BERGEN COUNTY COURT

STATE OF NEW JERSEY

Plaintiff

vs

JOSEPH A. DEL NOBILE

Defendant

INDICTMENT No. S142-68

This matter having been opened to the Court by John Dolan Harrington, Esq., attorney for the defendant, Joseph Del Nobile, and the Prosecutor of Bergen County consenting hereto, and it appearing that the attorney for the defendant will file an application for a Writ of Certiorari with the United States Supreme Court within forty-five (45) days of the date hereof, and it further appearing that the requisites of R. 2:9-4 have been complied with,

It is on this 15th day of October, 1970,

ORDERED that the bail of the defendant, Joseph Del Nobile, previously posted in the amount of Five Thousand ($5,000.00) Dollars be continued pending the decision of the Supreme Court of the United States on the application of the defendant for a Writ of Certiorari, and it is further

ORDERED that John Dolan Harrington, Esq., attorney for the defendant, shall notify this Court of the decision of

the United States Supreme Court on the application for a Writ of Certiorari within seventy-two (72) hours of such decision.

BENJAMIN P. GALANTI,
J.C.C.

Consented to as to form and entry by:

Bergen County Prosecutor's Office
By: ROBERT DILTS
County Prosecutor